

9 FAM 42.12 Notes

(TL:VISA-513; 01-23-2003)
(Office of Origin: CA/VO/L/R)

9 FAM 42.12 N1 Definitions

9 FAM 42.12 N1.1 "Foreign State" Defined

(TL:VISA-197; 07-15-1999)

a. For the purposes of INA 201, 202, or 203 the term "foreign state" shall include:

- (1) Any independent country;
- (2) Any self-governing dominion;
- (3) Any mandated territory; and
- (4) Any territory under the international trusteeship of the United Nations.

b. Sec. 103 of Public Law 101-649 made Hong Kong the equivalent of a foreign state beginning in FY 1991.

9 FAM 42.12 N1.2 "Dependent Area" Defined

(TL:VISA-394; 04-12-2002)

For the purposes of INA 201, 202 and 203, the term "dependent area" must include any colony, component or dependent area of a foreign state.

FAM 42.12 N2 Geographic Areas Subject to Numerical Limitations

9 FAM 42.12 N2.1 General Rule of Chargeability

(TL:VISA-513; 01-23-2003)

The numerical limitations prescribed in INA 201, 202, and 203 apply to the foreign states and dependent areas. [See 9 FAM 42.12 Exhibits I and II.] An immigrant visa applicant subject to these numerical limitations is generally chargeable to the numerical limitation applicable to the applicant's place of birth. An immigrant visa applicant born in a dependent area is chargeable to the dependent area (to ensure compliance with the dependent-area limitation imposed in INA 202), as well as to the mother

country.

9 FAM 42.12 N2.2 Changes in Territorial Limits

(TL:VISA-329; 10-26-2001)

If an alien's place of birth has undergone changes in political jurisdiction since the time of his or her birth, the alien is subject to the foreign state limitation of the state, which has jurisdiction over that place of birth at the time of visa application. [See 9 FAM 42.12 N2.3 for exceptions to the general chargeability rule.]

9 FAM 42.12 N2.3 Exceptions to General Chargeability Rule

(TL:VISA-513; 01-23-2003)

Exceptions to the general rule of chargeability are set forth in 22 CFR 42.12(b), (c), (d), and (e). These exceptions are as follows:

(1) An accompanying or following-to-join spouse or child, for whom a visa would not otherwise be available [see 9 FAM 42.12 N3];

(2) An alien born in the United States [see 9 FAM 42.12 N4]; or

(3) An alien born in a foreign state in which neither parent was born or had residence at the alien's time of birth [see 9 FAM 42.12 N5].

9 FAM 42.12 N3 Derivative Status for Spouse and Child

9 FAM 42.12 N3.1 To Prevent Separation of Family

(TL:VISA-197; 07-15-1999)

In order to prevent the separation of families, a spouse or child may be charged to the foreign state/dependent area of the principal alien provided:

(1) A visa would not be immediately available if the spouse or child were charged to his or her country of birth; and

(2) The spouse or child is accompanying or following to join the parent or spouse.

If either of these elements is missing, alternate chargeability cannot be used.

9 FAM 42.12 N3.2 If Principal Alien not Charged to Foreign State

(TL:VISA-329; 10-26-2001)

For the purposes of derivative chargeability under INA 202(b)(1) and (2), the parent or spouse need not actually have been charged to a foreign state or dependent area in order to confer that chargeability on a child or spouse. It is sufficient that the alien would be chargeable to that foreign state. For example, a parent or spouse entitled to immediate relative or special immigrant status may confer derivative foreign state chargeability if the child or spouse, as defined in the INA [see 9 FAM 40.1 Related Statutory Provisions], is accompanying or following-to-join the parent or spouse. [See 9 FAM 42.12 N3.]

9 FAM 42.12 N3.3 If Spouse or Child Acquired Prior to Admission

(TL:VISA-466; 10-01-2002)

a. A spouse or child acquired prior to the admission of the principal alien may be considered to be “following-to-join” regardless of the time, which may have elapsed, since the principal alien’s admission to the United States. The principal alien need not travel abroad to confer derivative foreign state chargeability.

b. A child born of a marriage that existed at the time of the principal alien’s admission is considered to have been “acquired” prior to the principal alien’s admission.

9 FAM 42.12 N3.4 If Spouse or Child Acquired Subsequent to Admission

(TL:VISA-394; 04-12-2002)

a. A spouse or child acquired subsequent to the principal alien's admission to the United States can benefit from derivative chargeability only when “accompanying” the principal alien.

b. The INA defines “accompanying” as, not only an alien in the physical company of the principal alien, but also to include a spouse or child issued a visa within six months of:

(1) The principal alien's admission into the United States;

(2) The principal alien's adjustment to lawful permanent resident status;
or

(3) The principal alien's personal appearance and registration at any Foreign Service post for the purpose of conferring alternate chargeability

[see 9 FAM 42.12 N5].

9 FAM 42.12 N3.5 Derivative Foreign State Chargeability if Petitioner Benefited from Alternate Chargeability

(TL:VISA-49; 10-30-1991)

An alien who benefited from alternate chargeability retains that chargeability for all time and all purposes and, thus, may confer that alternate chargeability to a spouse or child if it is more favorable. For example, an F-21 applicant (born in Hong Kong) whose spouse was also born in Hong Kong but was granted China chargeability at the time of immigration may be granted China chargeability when accompanying or following-to-join the principal applicant.

9 FAM 42.12 N3.6 Effect of Principal Alien's Naturalization

(TL:VISA-394; 04-12-2002)

The lack of a time limit on when a following-to-join derivative may immigrate may result in a case where the principal alien becomes a naturalized citizen. In such a case, the principal alien must file an immediate relative petition for the family member. [See also 22 CFR 42.21(a) and 9 FAM 42.21 N4.]

9 FAM 42.12 N3.7 Traveling Abroad to Confer Derivative Chargeability

(TL:VISA-329; 10-26-2001)

It is not necessary for an alien traveling abroad to confer alternate chargeability to travel to the post where the visa will be issued. If an alien travels to another post for the purpose of conferring alternate chargeability, the post of registration shall send the issuing post a priority VISAS OMEGA cable informing them of the alien's appearance and registration. Inasmuch as the law permits a child or spouse to follow to join, in lieu of accompanying, this procedure will rarely be necessary. It would, however, be required in the case of an after-acquired spouse otherwise chargeable to an over-subscribed foreign state, (e.g., a family-based second preference applicant born in India for whom numbers are not available may derive the LPR spouse's U.K. chargeability when "accompanying" the LPR to the United States.) [See 9 FAM 42.12 N2.3 above.]

9 FAM 42.12 N3.8 If One Spouse Confers Preference Status and the Other Confers Derivative Chargeability

(TL:VISA-329; 10-26-2001)

When one immigrant visa applicant can confer a more favorable preference status upon another at the same time the other immigrant visa applicant can confer a more favorable foreign state chargeability, both applicants can be considered principal aliens. In such cases, however, both applicants must be admitted to the United States simultaneously. The consular officer, therefore, must issue visas to both applicants simultaneously. For example, if the principal applicant was born in India and the accompanying spouse in France, the principal applicant born in India can be charged to his spouse's country of chargeability (France), even if the priority date is not current for India.

9 FAM 42.12 N3.9 No Derivative Chargeability for Parents

(TL:VISA-466; 10-01-2002)

Although a child may derive alternate chargeability through a parent, a parent cannot derive alternate chargeability from a child.

9 FAM 42.12 N4 Applicant Born in the United States

(TL:VISA-466; 10-01-2002)

a. INA 202(b)(3) applies to persons who, although born in the United States, are:

(1) Aliens by virtue of not having been subject to the jurisdiction of the United States at the time of birth (for example, children born to diplomats); or

(2) Former U.S. citizens who have lost their U.S. citizenship through expatriation.

b. Under the provisions of INA 202(b)(3), an immigrant visa applicant born in the United States shall be chargeable to:

(1) The country of which he is a citizen or subject; or

(2) The country of the alien's last place of residence, if the alien is not a citizen or subject of any country.

c. The consular officer must resolve any doubts regarding an immigrant visa applicant's U.S. citizenship status before final action is taken on the visa application. [See 9 FAM 40.2 N1(b) and 9 FAM 42.71 N5.]

9 FAM 42.12 N5 Applicants Place of Birth, not Parents' Country of Birth or Residence

(TL:VISA-17; 11-21-1988)

a. If the consular officer has determined that, **at the time of the child's birth**, the parent or parents were stationed in such country under orders or instructions of an employer, principal or superior authority whose business or profession was foreign to that foreign state, the applicant may be charged to the foreign state of either parent.

b. The provisions of INA 202(b)(4) also apply to an alien born on the high seas.